In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1128

WALTHAM WATCH COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

This is the third of three recent Federal Trade Commission proceedings in which the Commission has found that Section 5 of the Federal Trade Commission Act was violated by the use of deceptive practices in the sale of "Waltham" watches and clocks. See *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F. 2d 28 (C.A. 7), certiorari denied, 375 U.S. 944; *Waltham Precision Instrument Co.* v. *Federal Trade Commission*, 327 F. 2d 427 (C.A. 7), certio-

rari denied, 377 U.S. 992. In the present case, the Commission found (a) that the name "Waltham" was a deceptive indication of the manufacturing source of the goods; (b) that petitioners misrepresented that their watches contained a particular number of jewels when some of that number were not bona fide jewels but were part of a so-called "Resevoil" device located inside the watch; and (c) that in their advertising, catalogue sheets, and preticketing, petitioners disseminated fictitious list prices which they knew were in excess of their customary prices. The Court of Appeals for the District of Columbia Circuit affirmed *per curiam* (Pet. App. C, p. 5a), relying upon the prior *Waltham* decisions and other cases. No issue is presented warranting consideration by this Court.

1. While the defendants in the three recent *Waltham* cases varied,[1] the cases all involved the same substantive issue regarding the use of the name "Waltham" on watches or clocks whose components were imported to, and then assembled in, the United States. The Commission found that the name falsely represented to consumers that the watches were manufactured in the United States by the well-known Waltham Watch Company of Waltham, Massachusetts. In each of the cases the Commission ruled that the use of the name was deceptive and therefore in viola-

[1] Three successive proceedings were made necessary by changes in ownership and management of the petitioner company and by the extension of deceptive practices to products not covered by preceding orders.

tion of Section 5 of the Federal Trade Commission Act; in each case the agency decision was affirmed by a court of appeals; and this Court denied certiorari in each of the previous two cases. The examiner here found that the parties had stipulated facts sufficient to justify issuance of an order against them similar to that in the last *Waltham* case (Pet. App. D, p. 9a). Thus, the question whether petitioners' advertising is deceptive with respect to the source of their product is plainly unworthy of certiorari. See the Memorandum for the Federal Trade Commission in Opposition filed in the first *Waltham* case, No. 495, O.T. 1963, pp. 2-6.

Petitioners contend here, however, that notwithstanding the deceptive effect of the name "Waltham" they should be permitted to use it because of a change in the Commission's policy. Petitioners maintain that under the policy expressed in Administrative Bulletin 64-10 (Pet. App. F, pp. 23a-25a) the Commission will not now prosecute cases against any of their competitors who falsely represent that their watches are manufactured entirely within the United States, and that these competitors will, therefore, have an advantage over petitioners. This argument is without merit. Bulletin 64-10 does not license the sort of misrepresentations made by petitioners; it explicitly states that country-of-origin misrepresentations will be prosecuted in appropriate circumstances. Moreover, many of petitioners' competitors are already subject to

country-of-origin orders.[2] In any event, it is well established that it is within the Commission's discretion to bring suit or enter an order against one competitor but not against others, and this sort of selectivity is no basis for reversing its judgment. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411; *Regina Corporation* v. *Federal Trade Commission*, 322 F.2d 765, 768 (C.A. 3); *W. M. R. Watch Case Corporation* v. *Federal Trade Commission*, 343 F. 2d 302 (C.A. D.C.), certiorari denied June 1, 1965, No. 1067, this Term.

2. In the second of the previous two *Waltham* cases, and in *Tornek* v. *Federal Trade Commission*, 55 F.T.C. 1770, affirmed, 276 F. 2d 513 (C.A. D.C.), certiorari denied, 364 U.S. 829, the Commission found that the alleged watch "jewels" contained in a so-called "Resevoil" device do not meet the industry definition of jewels. The Commission therefore held that it is deceptive to advertise a watch as having a number of jewels when some of them are part of the "Resevoil" device. The examiner stated that the parties had stipulated sufficient facts on this issue also

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[2] Such orders have been entered, for example, in *Detra Watch Case Corporation*, Docket No. 8597; *Savoy Watch Case Co.*, Docket 8080; *Hilton Watch Co.*, Docket 8402; *Berco, Inc.*, Docket C-621; *W. M. R. Watch Case Corporation* v. *Federal Trade Commission*, 343 F. 2d 302 (C.A. D.C.), certiorari denied June 1, 1965, No. 1067, this Term. Several of these orders were issued in proceedings which ended shortly before the issuance of Bulletin 64-10, but the order in *Detra Watch Case Corp., supra*, was issued in a case which continued to be prosecuted after Bulletin 64-10 became operative on May 6, 1964.

to support a cease-and-desist order (Pet. App. D, p. 9a). Commission orders against this sort of misrepresentation have been sustained by courts of appeals in three cases, and this Court denied certiorari in the second *Waltham* case and in *Tornek*. See the Brief for the Federal Trade Commission in Opposition in the *Tornek* case, No. 282, O.T., 1960.

3. The only question presented here which was not involved in the previous cases concerns petitioners' dissemination of deceptive list prices. The Commission found that, while representing that their disseminated list prices were "established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory," petitioners in fact knew that their list prices were appreciably higher than the highest price at which substantial sales were made in the areas in which they sold. Consequently, it held that petitioners' list prices were not disseminated as a good-faith estimate of the actual retail selling price (Pet. App. B, p. 2a). The Commission's final order prevents petitioners from disseminating a list price that is "not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in [petitioners'] trade area" (Pet. App. B, p. 4a).

Petitioners object to this decision on the ground that the Commission improperly modified the examiner's findings and order, apparently in conformity with the Commission's revised Guides Against Decep-

tive Pricing.[3] But the only relevant question is whether the modified findings and order are supported by substantial evidence. On this issue the record supports the conclusions that Waltham watches were customarily sold at prices far below petitioners' disseminated list prices, and that petitioners knew their disseminated list prices were not the usual and customary retail prices (Pet. App. D, pp. 10a-12a). The court of appeals, therefore, properly rejected petitioners' contention that the modified findings did not have evidentiary support.[4]

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[3] The Commission's Guides are set out at Pet. App. E, pp. 19a-22a. The examiner's findings, at Pet. App. D, pp. 13a-14a, were that petitioners disseminated or caused to be disseminated fictitious list prices which they knew were in excess of the usual and customary price of their product, but which they nevertheless represented to be the usual and regular retail price.

[4] Petitioners erroneously argue that the present decision and order are contrary to others issued by the Federal Trade Commission. The relevant Commission opinions, printed in petitioners' appendices H and J, are not contrary to the present decision. And since the Commission has ruled that all outstanding cease-and-desist orders are to be interpreted, and thus *pro tanto* modified, to impose no greater or different obligations than are stated in the Commission's revised Guides Against Deceptive Pricing, there is no possibility of a conflict in orders. See *In the Matter of Clinton Watch Company, et al.*, Order on Petition to Reopen Proceeding, Docket No. 7434, Pet. App. L., pp. 44a-45a; *In the Matter of Art National Manufacturers Distributing Co., Inc., et al.*, Order Denying Petition to Modify Order and Decision, Docket No. 7286, Pet. App. M, pp. 47a-49a.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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